UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OGC-NRLO 5/31/06

**MEMORANDUM**

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OFFICE OF
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Assistant Administrator
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Assistant Administrator
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Regional Administrators, Regs. I-X

Regional Counsel, Regs. I-X

**FROM:** Ann R. Klee
General Counsel

**SUBJECT:** Applicability of Clean Air Act Section 112(r)(1) General Duty Clause and Section 112(r)(7) Risk Management Program to Liquefied Natural Gas Facilities

A number of EPA regions are involved in the review and licensing of proposed on- and off-shore liquefied natural gas (LNG) distribution facilities. The Office of General Counsel (OGC) has been working with regional and headquarter offices to coordinate the Agency's response to legal issues raised by these facilities. An issue that has arisen is the applicability of the "general duty clause" of Clean Air Act (CAA) section 112(r)(1) and the Risk Management Program (RMP) regulations under CAA section 112(r)(7). The purpose of this memorandum is to clarify that the language of the statute and the legislative history demonstrate that Congress did not intend the general duty clause and the RMP regulations to apply to LNG facilities to the extent they transport, or store incident to transportation, extremely hazardous substances, including methane.[1] This memorandum supercedes all previous memoranda and opinions on this topic.

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[1] LNG facilities at which "extremely hazardous substances" are present for reasons other than transportation or storage incident to transportation are subject to the general duty clause with respect to those substances. LNG facilities at which substances listed under CAA section 112(r)(3) are present in more than threshold quantities for reasons other than transportation or storage incident to transportation are subject to the RMP regulations with respect to those substances. Thus, for example, a LNG facility that stores ammonia for use at the terminal above the applicable threshold would be subject to the general duty clause and the RMP for the ammonia it stores.

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**Statutory Background**

CAA section 112(r) establishes a two-tier system for preventing accidental releases of "extremely hazardous substances" from "stationary sources." The section 112(r)(1) general duty clause requires stationary sources storing or using any extremely hazardous substance to identify hazards associated with such substance and design and maintain a safe facility. RMP regulations under section 112(r)(7) require stationary sources having more than a "threshold quantity" of a "regulated substance" to develop and implement "risk management programs" and submit "risk management plans" describing those programs. "Regulated substances" are the chemicals identified by EPA under section 112(r)(3) as posing the greatest risk to public health and the environment in the event of an accidental release.

Both section 112(r)(1) and section 112(r)(7) apply to "stationary sources." Section 112(r)(2)(C) defines "stationary source" for the purpose of section 112(r) as "any buildings, structures, equipment, installations or substance emitting stationary activities (i) which belong to the same industrial group, (ii) which are located on one or more contiguous properties, (iii) which are under the control of the same person (or persons under common control), and (iv) from which an accidental release may occur." This definition is similar but not identical to other CAA definitions of "stationary source."

The legislative history of section 112(r) indicates that Congress did not intend the term "stationary source" to include transportation facilities (*e.g.*, LNG facilities) for purposes of either section 112(r)(1) or section 112(r)(7). Members of the Conference Committee for the Clean Air Act Amendments of 1990, which added section 112(r), stated that "[t]he conferees do not intend the term 'stationary source' to apply to *transportation, including the storage incident to such transportation*, of any regulated substance or other extremely hazardous substance under the provisions of this subsection," referring to section 112(r). Joint Explanatory Statement of the Committee of the Conference at 340 (emphasis added).[2]

Section 112(r) provides both discretionary and mandatory regulatory authority. Under section 112(r)(7)(A), the Agency "is authorized" to issue "release prevention, detection, and correction requirements" that "may make distinctions between various types, classes, and kinds of facilities." Section 112(r)(7)(B)(i), by contrast, requires EPA to issue regulations "to provide,

[2] This conference statement is particularly enlightening given the scope of the Senate's original version of 112(r), which sought to apply 112(r) to the "broadest set of activities . . . including, but not limited to, *transportation* . . . activities" (emphasis added). The conference made it clear that it was adopting a position contrary to the Senate's original version.

to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases. . . ." It further stipulates that "[t]he regulations shall cover storage." The regulations must meet other criteria set forth in section 112(r)(7)(B)(ii), which provides, among other things, that the "regulations . . . shall require the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source . . . ."

**Regulatory History**

In 1994, EPA issued a rule under section 112(r)(3) listing toxic and flammable chemicals as "regulated substances" for purposes of the regulations EPA was required to issue under section 112(r)(7)(B). As part of that rulemaking, EPA promulgated a definition of "stationary source" that excluded "transportation, including storage incident to transportation, of any regulated substance or any other extremely hazardous substance under the provisions of this part, provided that such transportation is regulated under [specified DOT regulations regulating LNG terminals and pipelines]." 59 Fed. Reg. 4478, 4493 (January 31, 1994). EPA explained in the rule's preamble that "[f]or purposes of regulations under section 112(r), the term stationary source does not apply to transportation conditions, which would include storage incident to such transportation, of any 112(r) regulated substance. Pipelines, transfer stations, and other activities already covered under DOT as transportation of hazardous substances by pipeline, or incident to such transportation [under the specified regulations] would not be covered." *Id.* at 4490.

In 1996, EPA proposed to revise the definition to clarify that exempt transportation includes, but is not limited to, transportation activities subject to the DOT regulations specified in the promulgated definition. The Agency explained that it "intended to exclude from the definition of stationary source all transportation and storage incident to transportation to be consistent with EPCRA [the Emergency Planning and Community Right-to-Know Act]." 61 Fed. Reg. 16,598, 16,601 (April 15, 1996). The Agency viewed CAA section 112(r) as an extension of EPCRA, which excludes transportation and storage incident to transportation. *See,* e.g., 58 Fed. Reg. 5,102 (January 19, 1993). The legislative history of section 112(r) confirms that Congress considered section 112(r) as building on EPCRA's requirements that covered facilities inform local and state officials of extremely hazardous chemicals at the facilities and that local and state officials plan for responding to a release of those chemicals. *See,* e.g., S. Rept. 101-228 at 250.

In 1998, EPA promulgated a revised definition of "stationary source" that remains in effect today. 63 Fed. Reg. 640, 642-43 (January 6, 1998). It clarified, among other things, that the exemption for regulated substances in transportation, or in storage incident to such

transportation, is not limited to LNG terminals and pipelines subject to the DOT regulations cited in the definition. *Id.* at 642. One commenter on the proposed rule noted that in proposing to revise the definition to more broadly exclude transportation, including storage incident to transportation, EPA was "following the wishes of Congress," citing the legislative history discussed above. The commenter requested that EPA provide a written confirmation of its interpretation of congressional intent. EPA responded as follows:

> EPA agrees that the exclusion of transportation and storage incident to transportation from the definition of stationary source is consistent with Congressional intent. The definition of stationary source that EPA is promulgating reflects the language of the Congressional report quoted by one of the commenters.

*List of Substances and Thresholds for Accidental Release Prevention; Proposed Amendments: Summary and Response to Comments* (hereinafter RTC), December 1997, p. 21.

In 1996, EPA issued its RMP regulations under section 112(r)(7)(B), thereby discharging its mandatory duty to issue regulations under that provision. The RMP regulations added the substantive requirements that apply to "stationary sources," as defined by the list rule, at which "regulated substances" are present above applicable threshold quantities. When the "stationary source" definition was revised in 1998, it clarified the scope of the RMP regulations.

**Regulation of LNG Facilities**

On-shore LNG facilities are subject to Department of Transportation (DOT) safety standards. *See* 49 C.F.R. part 193 (Liquefied Natural Gas Facilities: Federal Safety Standards); 33 C.F.R. part 127 (Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas). DOT's regulations comprehensively prescribe safety, design, siting, construction, equipment, operations, maintenance, training, fire protection, and security requirements for all on-shore LNG facilities. LNG facilities must be designed and located to minimize the hazards to persons and offsite property resulting from leaks and spills of natural gas. In particular, on-shore LNG facilities must have a "thermal exclusion zone" around the facility, which is determined by conducting modeling using parameters specified by DOT (analogous to EPA's off-site consequence analyses).

Off-shore LNG facilities are regulated by DOT's Maritime Administration (MARAD) and the Coast Guard under the Deepwater Port Act and the Maritime Transportation Security Act of 2002 (MTSA). *See* 33 U.S.C. § 1503; 46 U.S.C. § 210; 33 C.F.R. parts 148, 149, and 150. Off-shore facilities currently are subject to "interim" regulations. These regulations contain

standards for facility licensing, siting, construction, design, operations, inspection, personnel training and qualifications, vessel navigation and safety zones, fire protection, emergency plans and operations, and workplace safety and health. The MTSA mandates that permanent standards be adopted "as soon as practicable." The Coast Guard expects to finalize permanent standards in 2006.

## Analysis

### A. Clean Air Act Section 112(r)(7) RMP Regulations Do Not Apply to On- or Off-shore LNG Facilities

EPA has expressly provided that the RMP regulations do not apply to on-shore LNG facilities to the extent they transport or store incident to such transport regulated substances. In 1996, EPA defined "stationary source," the legal prerequisite for being subject to the RMP regulations, as "excluding transportation, including storage incident to transportation, provided such transportation is regulated under 49 CFR part 192, 193, or 195. . . . as well as transportation subject to natural gas or hazardous liquid programs for which a state has in effect a certification under 49 U.S.C. section 60105." 61 Fed. Reg. at 16,601. In 1998, EPA clarified that the "transportation exemption" was not limited to just sources regulated by DOT, but included transportation and storage incident to transportation generally. 63 Fed. Reg. at 642. It also reiterated that the exemption "applies to liquefied natural gas (LNG) facilities subject to [DOT] oversight or regulation . . . or a state natural gas or hazardous liquid program." *Id.* EPA made clear that it promulgated such a definition of "stationary source," *i.e.*, one that excludes transportation and storage incident to transportation, including LNG facilities, to be "consistent with Congressional intent." *See* RTC at 21. As discussed in greater detail below, EPA did not suggest that it was narrowly interpreting the statutory definition of "stationary source" for RMP regulatory purposes.

The above-cited preamble discussions addressed on-shore LNG facilities only; at the time there were no existing or proposed off-shore LNG facilities. The revised definition of "stationary source" and the accompanying preamble discussions, however, make clear that off-shore LNG facilities also qualify for the transportation exemption and thus are not subject to the RMP regulations. Consistent with Congress's express intent to exempt all transportation facilities from 112(r), EPA broadened the transportation exemption to all transportation, including storage incident to transportation. There is no doubt that off-shore LNG facilities are transportation facilities, since they are functionally equivalent to on-shore LNG facilities. Although off-shore facilities are not subject to 49 C.F.R. parts 192, 193, or 195, as discussed above, they are subject to comprehensive regulation by MARAD and the Coast Guard. *See* 33 C.F.R. parts 148, 149, and 150. Thus, there is no legal or policy reason to subject off-shore LNG facilities to the RMP

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regulations.

**B. Clean Air Act 112(r)(1) General Duty Clause Does Not Apply to On- or Off-shore LNG Facilities**

**1. Congress unambiguously exempted transportation facilities from the definition of "stationary source"**

As discussed above, Congress expressed its intent that "'stationary source' not apply to transportation, including the storage incident to transportation, of any *regulated substance or other extremely hazardous substance* under the *provisions*" of section 112(r) (emphasis added). The conference 's use of the phrase "provisions of section 112(r)" indicates that it intended to exempt transportation facilities from all of section 112(r), not just 112(r)(7). Had Congress intended to exempt transportation facilities only from certain subsections or subparagraphs, presumably it would have said so. Elsewhere in the CAA and its legislative history, Congress made such distinctions.

The Committee's reference to "any regulated substance *or other extremely hazardous substance"* (emphasis added) further evidences that it was addressing section 112(r) generally, not just the section 112(r)(7)(B) RMP program. Section 112(r)(7)(B) applies only to the more limited universe of "regulated substances," whereas other section 112(r) provisions, including section 112(r)(1), apply to both "regulated substances" and "other extremely hazardous substances." Had Congress not intended to exempt transportation facilities from the entirety of section 112(r), or, stated differently, had it intended to exempt such facilities only from the RMP regulations, it would not have referenced "other extremely hazardous substances," since 112(r)(7)(B) regulates only "regulated substances."

Taken together, the Conference Committee's references to "provisions of section 112(r)" and "extremely hazardous substances," demonstrate unequivocally that Congress intended to exempt transportation facilities from 112(r) generally, including the 112(r)(1) general duty clause.

**2. Because LNG facilities are not "stationary sources," they cannot be subject to either the "general duty" clause or the RMP regulations**

Section 112(r)(7)(B) and section 112(r)(1) both apply to "stationary sources," and section 112(r)(2)(C) defines "stationary source" for purposes of section 112(r) generally. Neither section 112(r)(7)(B) nor section 112(r)(1) authorizes EPA to narrow the meaning of "stationary source" as it is used in that provision. Section 112(r)(7)(B) requires EPA to regulate only those "stationary sources" having more than a threshold quantity of a regulated substance, but the

statutory definition of "stationary source" otherwise governs the applicability of the regulations. Section 112(r)(1) directly imposes a general duty of care on "stationary sources" with no narrowing of the universe of covered facilities. In implementing both section 112(r)(7)(B) and section 112(r)(1), EPA is thus applying the statutory definition of "stationary source."

Under standard rules of statutory construction, the Agency's ability to interpret the statutory definition of "stationary source" one way for section 112(r)(7)(B) and another way for section 112(r)(1) is limited. For EPA to adopt different interpretations of "stationary source" for different provisions of section 112(r), there must be statutory support for different interpretations and a reasonable explanation for the difference. No such support or explanation exists here. Nothing in the statute or its legislative history suggests that Congress intended "stationary source" as defined by section 112(r)(2)(C) to be interpreted differently for different provisions of section 112(r). In fact, as discussed above, the legislative history indicates just the opposite.

Moreover, in promulgating, and later revising, the regulatory definition of "stationary source," EPA did not suggest that it was narrowly interpreting the statutory definition of that term for purposes of the RMP regulations. The Agency explained that excluding transportation and storage incident to transportation would make CAA section 112(r) consistent with EPCRA, its legislative antecedent. In response to a commenter, EPA expressly acknowledged that the regulatory definition of "stationary source" was consistent with congressional intent. EPA provided no explanation of why, as a policy matter, transportation and storage incident to transportation should be excluded from the RMP regulations and not from the other provisions of section 112(r), including the general duty clause.

Presumably, such an explanation would have been critical in light of the section 112(r)(7)(B) requirements that the RMP regulations cover "storage" and "provide, to the greatest extent practicable" for the prevention and mitigation of accidental releases from "stationary sources." A regulatory definition of "stationary source" that excluded transportation and storage incident to transportation arguably would have been inconsistent with those statutory directives, and thus would have required a reasoned explanation to provide an adequate basis for the regulatory exemption. The only explanation EPA gave of the legal basis for the regulatory definition of "stationary source" was that it is consistent with congressional intent as revealed in legislative history. Thus, there is no basis in the rulemaking record of the RMP regulations to suggest now that EPA intended to narrowly interpret the statutory definition of "stationary source" only for regulatory purposes.[3] As such, the Agency cannot now advance such an

[3] Thus, this situation is distinguishable from the Resource Conservation and Recovery Act (RCRA) context in which EPA defined the term "solid waste" for regulatory purposes more

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argument simply to support an effort to justify subjecting LNG facilities to the 112(r) general duty clause. Even assuming that the CAA afforded EPA the discretion to define "stationary source" differently for purposes of sections 112(r)(1) and 112(r)(7), the Agency would have to undertake rulemaking to accomplish what effectively would be a reversal of its initial interpretation of section 112(r)(C)(2).

**Conclusion**

To the extent LNG facilities transport, or store incident to transport, regulated substances or extremely hazardous substances, they are exempt from CAA section 112(r), including the section 112(r)(1) general duty clause and the section 112(r)(7) RMP regulations. The legislative history of section 112(r) is clear that Congress intended to exclude from the statutory definition of "stationary source," and thus from regulation under 112(r) generally, facilities, like LNG facilities, that transport, or store incident to such transport, extremely hazardous substances. If you have any questions, please call me, Chet Thompson, or Nancy Ketcham-Colwill of my staff.

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narrowly than the statutory definition. *See* RCRA § 1004(27) and 40 C.F.R. pt 261.2. In that situation, EPA was exercising its regulatory discretion to more narrowly define a statutory term for regulatory purposes. Here, by contrast, EPA adopted for regulatory purposes the statutory definition of stationary source. Had EPA adopted a regulatory definition of stationary source that included transportation facilities, it would have effectively expanded the statutory definition, not narrowed it.